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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 71-1

R. O. CRAIG,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California In and for the Third Appellate District

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The original opinion of the Court of Appeal of the State of California, in and for the Third Appellate District is reported as The People of the State of California, respondent vs. Frank Haygood et al, defendants; R. O. Craig, appellant, at 179 Cal.App.2d 112. The opinion of the Court of Appeal of the State of California, in and for the Third Appellant District, on petitioner R. O. Craig's Motion to Recall the Remittitur is unreported and is attached to this Opposition in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the rule of *Boykin v. Alabama,* 395 U.S. 238, should be applied retroactively to a judgment of conviction upon a plea of not guilty by reason of insanity entered ten (10) years before the *Boykin* decision?

2. Whether the refusal of the trial court to appoint new counsel for petitioner on the day of his State trial was a violation of due process of law.

3. Whether petitioner's representation at his State court trial was Constitutionally adequate.

4. Whether the trial court properly determined the crime committed by petitioner to be robbery in the first degree.

5. Whether the action of the trial court in imposing a consecutive sentence upon petitioner was a violation of due process of law.

STATUTES INVOLVED

California Penal Code Sections 1016, 211 and 211(a) are set forth in the Appendix.

STATEMENT OF THE CASE

On December 30, 1958, an information was filed in the Superior Court of the State of California, in and for the County of Shasta, accusing petitioner and two

others of the crime of robbery in violation of California Penal Code Section 211 (CT 1).[1]

On January 5, 1959, petitioner and his two codefendants appeared and Mr. Pickering was appointed Public Defender to represent them. Petitioner was arraigned along with his two codefendants, who entered pleas of guilty. Petitioner entered a single plea of not guilty by reason of insanity and his case was continued to January 7, 1959 (CT 8).

Petitioner's codefendants, being ineligible for probation, requested that the matter not be referred to the Probation Department and also requested that judgment be pronounced. The codefendants were then arraigned for judgment and the court determined that the offense was robbery in the first degree. The court then sentenced petitioner's codefendants to state prison for the term prescribed by law (CT 9).

On January 7, 1959, petitioner and his attorney appeared and the trial was set for January 15, 1959. Two psychiatrists were to be appointed by the court to testify at trial (CT 9–10).

On January 12, 1959, petitioner, with counsel, appeared and his trial was continued to January 21, 1959 (CT 10–11).

On January 21, 1959, petitioner, with counsel, appeared for trial. After a discussion of matters of law outside the presence of the prospective jurors, the jury was selected and the cause presented. The jury was instructed and returned a verdict finding peti-

[1] CT refers to Clerk's Transcript on appeal.

tioner to have been sane at the time of the offense (CT 11–18).

On January 26, 1959, petitioner, with counsel, appeared, waived reference to the Probation Officer, and the court pronounced judgment, finding petitioner guilty of robbery in the first degree in violation of California Penal Code Section 211. The court ordered the petitioner imprisoned in the state prison for the term prescribed by law (CT 18–19).

On February 2, 1959, petitioner filed a notice of appeal (CT 7). On March 21, 1960, petitioner's conviction was affirmed in *People v. Haygood* (1960) 179 Cal.App.2d 112.

On July 9, 1970, the Court of Appeal for the State of California, Third Appellate District, having considered petitioner's Motion to Recall the Remittitur and Reinstate the Appeal, determined to withhold its decision on the Motion to Recall the Remittitur pending further briefing and oral argument.

On September 11, 1970, petitioner filed his opening brief.

On November 12, 1970, respondent filed his Opposition to the Petition to Recall the Remittitur and Reinstate the Appeal.

On January 20, 1971, the case was argued and submitted.

On February 26, 1971, the Court of Appeal for the State of California, Third Appellate District, filed its unpublished opinion denying the Motion to Recall the Remittitur.

On March 11, 1971, petitioner filed a Petition for Rehearing in the Court of Appeal of the State of California, in and for the Third Appellate District.

On March 24, 1971, the Petition for Rehearing was denied.

On March 29, 1971, petitioner filed a Petition for Hearing in the California Supreme Court.

On April 29, 1971, the California Supreme Court denied the Petition for Hearing.

STATEMENT OF THE FACTS

Preliminarily, respondent would note that since petitioner's plea of not guilty by reason of insanity admitted the substantive offense (California Penal Code Section 1016), the only evidence presented at the State Court trial was directed to the question of petitioner's sanity. As a result, the prosecution did not call any witnesses to the crime who may have been available, such as the victim or petitioner's codefendants who had already pled guilty and been sentenced to prison. The evidence which was presented consisted mainly of statements which petitioner made to the arresting officers and others, to psychiatrists, and petitioner's own testimony. Since these were the only witnesses called, it is evident that the actual facts of the crime were not presented in detail, as petitioner's plea made this unnecessary. A brief summary of the evidence which was presented at petitioner's sanity trial is set forth below.

The prosecution first established petitioner was an inmate of the State Department of Corrections serving a sentence at the High Rock Conservation Camp in Weott, where he was first received on July 14, 1958 (RT 18–23).[2]

Detective Ochs of the Redding Police Department then testified with regard to a conversation he had with petitioner on December 24, 1958, as he was transporting him from Red Bluff to Redding after his apprehension (RT 24–25). At that time petitioner told Detective Ochs that he and his companions had found some wine and had been drinking. They realized that they were two hours late on the count, which would be the same as an escape. They talked things over and decided to leave (RT 25–27).

In Rio Dell they obtained a car which contained a shotgun and took off. Upon arriving in Redding, they drove around for most of the day and then early in the evening went to the Empire Bar where they had a few drinks. Since they were short of money, they went outside and looked the place over. Around midnight petitioner's codefendants went in and conducted the holdup. Petitioner stayed in the car and was driving when they left (RT 25–27). Petitioner also told Detective Ochs that they eventually wanted to get to Mexico but after the holdup decided to go to Chico in order to work something out (RT 25–27).

Petitioner then told Officer Ochs how they were stopped by the highway patrol and escaped on foot.

[2] RT refers to Reporter's Transcript on appeal.

They hid out in a barn until they were later captured in Red Bluff (RT 27–29). In a second conversation with Detective Ochs, petitioner told him that he felt there was something wrong with him and he couldn't understand why he left when he only had such a short time to do (RT 29–30).

During the questioning conducted by Ochs, petitioner didn't seem to be confused with regard to questions asked. He apparently was aware of who handled the shotgun and drove the car (RT 31).

Lieutenant Maley of the Redding Police Department also had a conversation with petitioner (RT 32–33). Petitioner told him that he was pretty drunk and didn't have too much of a memory of the events until the car in Rio Dell (RT 33–34).

He told the officer that the three of them had talked it over and decided that codefendant Haygood would handle the shotgun and codefendant Bentley would go with him to grab the money. Petitioner would drive the car. The two codefendants then entered the bar and he remained in the car in an alley behind it. He was the driver when they came out after the holdup (RT 34).

In a previous conversation, petitioner also told Officer Maley that he must have been crazy because anybody that would cut out when he had twelve days to go must be crazy. Petitioner did not mention any blackouts but he did say that they had been drinking and couldn't make it back for bed check (RT 35).

Additional testimony concerning petitioner's arrest was presented by Lieutenant Schoelen of the Red Bluff Police Department (RT 36–68) and Captain Blohm of the California Highway Patrol (RT 39–41). At the time of his arrest, Captain Blohm asked him why and petitioner said that he hadn't had anything to drink for a long time, so that when he got the wine he didn't remember going to Rio Dell (RT 40). Petitioner also related the events concerning their activities after being stopped at the police road block (RT 40–41).

The testimony of the two doctors appointed by the court, Dr. Lieberman (RT 42–66) and Dr. Anderson (RT 66–74), established that it was their opinion that petitioner was mentally disturbed and had a sociopathic personality but that he knew the difference between right and wrong and the nature and quality of his acts. He was, therefore, legally sane. *People v. Haygood, supra,* (1960) 179 Cal.App.2d 112. Included in Dr. Lieberman's testimony was a statement that petitioner made in the doctor's interview to the effect that he had a drink of whiskey and following that he couldn't remember much until he was in the brush alongside the Sacramento River about three days later (RT 44–45).

Petitioner testified in his own behalf. He stated that his two codefendants had offered him a drink of whiskey and he took a shot. He then felt a sensation and went outside and walked around. When he cooled off he came back and his codefendants then

returned. They offered him more whiskey but he refused (RT 75–76). The three then went to the rec hall and petitioner didn't feel good. Apparently the last thing he remembered was being in the rec hall in a crowd of 15 to 20 others (RT 76).

Regarding the events surrounding the robbery, petitioner testified that because of the code of the penitentiary he told the officers what he did in order to protect the boys. He had previously explained how he felt to Frank (Haygood) and Frank told him what to say. Petitioner did remember driving a car and some red flares, but he didn't remember anything concerning the robbery (RT 76). He didn't have any recollection other than what he was told by Haygood and Bentley (RT 81).

Petitioner also testified concerning some blackout spells that he had which began about nine years previously while he was in the Texas Penitentiary (RT 77). He also admitted spending time in the United States Public Health Hospital in Fort Worth for narcotic addiction and that he became an addict at age 13 (RT 77). Petitioner also related that he was involved in group therapy while he was in prison (RT 80).

On cross-examination petitioner stated that he didn't deny the robbery, escape or car theft. He didn't deny anything. All he wanted to do was tell them that he needed help and that was what he was asking for (RT 89).

ARGUMENT

I. The Rule of Boykin v. Alabama Should Not Be Applied to This Case

Initially it should be noted that California Penal Code Section 1016 has been tested by Constitutional standards of due process of law on more than one occasion in the California courts, and has consistently been held to be Constitutional. See, for example, *People v. Hickman* (1928) 204 Cal. 470; *People v. Walker* (1948) 33 Cal.2d 250; *cert denied* 336 U.S. 940; *People v. Daugherty* (1953) 40 Cal.2d 876, *cert denied* 346 U.S. 827, rehearing denied, 346 U.S. 880.

Petitioner's present attack on the Section is however based on the recent decision of this court in *Boykin v. Alabama* (1969) 395 U.S. 238. He argues that because of the provisions of California Penal Code Section 1016, a defendant who pleads only not guilty by reason of insanity admits the commission of the offense, and therefore he has, in effect, entered a plea of guilty in violation of the Constitutional standards as set forth in the above decision.

Respondent would first point out that petitioner's plea of not guilty by reason of insanity was entered on January 5, 1959, over ten years before the decision of this court in *Boykin*. In *In re Tahl* (1969) 1 Cal.3d 122, *cert denied* 398 U.S. 911, the California Supreme Court held that the requirements of *Boykin* were to be given prospective application only i.e., to those cases in which pleas were entered subsequent to the effective date of that decision.

At least five Federal Circuit Courts have also refused to apply *Boykin* retroactively. See for example *U.S. ex rel Rogers v. Adams,* 435 F.2d 1372 (2d Cir 1970); *U.S. ex rel Sanders v. Maroney,* 438 F2d 1185 (3d Cir 1970); *Smith v. Cox,* 435 F.2d 453 (4th Cir 1970); *Meller v. State of Missouri,* 431 F.2d 120 (8th Cir 1970) *cert denied* 400 U.S. 996; *Reliford v. Craven,* 434 F.2d 1315 (9th Cir 1970).

Since the *Boykin* requirements are to be given prospective application only, petitioner's contention can therefore be disposed of on this ground since his plea was entered long before this decision.

Moreover, the California Supreme Court recently reversed a judgment of conviction in *People v. Rizer* (1971) 5 Cal. 3d 35, a case in which the defendant had entered pleas of not guilty by reason of insanity (after *Boykin*) because the pleas did not meet the specifications of that case. The highest court in California has thus recognized that the *Boykin* requirements are not limited to straight pleas of guilty, but must also be applied to equated situations when the plea involved occurred after the date of the *Boykin* decision. In light of this decision it is evident that in California, a defendant who pleads only not guilty by reason of insanity, would be afforded the same protection as *Boykin* requires of one who enters a plea of guilty.

II. The Refusal of the Trial Court to Appoint New Counsel for Petitioner on the Day of His Sanity Trial Was Not a Violation of Due Process of Law

Petitioner raises various contentions concerning his representation at trial which he asserts amounted to a denial of due process of law. In this regard he asserts that his attorney represented conflicting interests. He also asserts that this attorney did not wish to represent him, but was forced to do so by the trial court, or allow petitioner to proceed without counsel.

As to petitioner's assertion that his attorney represented conflicting interests, the California Supreme Court, citing several decisions of this Court, stated in *People v. Chacon* (1968) 69 Cal.2d 765 that:

> "The right to counsel at trial guaranteed by the Sixth Amendment of the United States Constitution (Gideon v. Wainwright (1963) 372 U.S. 335 [9 L.Ed.2d 799, 83 S.Ct. 792, 93 A.L.R.2d 733]) and article I, section 13 of the California Constitution does not include an automatic right to separate counsel for each codefendant. One counsel may represent more than one defendant so long as the representation is effective. (Powell v. Alabama (1932) 287 U.S. 45, 71 [77 L.Ed. 158, 171–172, 53 S.Ct. 55, 84 A.L.R. 527].) Effective assistance of counsel is assistance 'untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.' (Glasser v. United States (1942) 315 U.S. 60, 70 [86 L.Ed. 680, 699, 62 S.Ct. 457]; People v. Douglas (1964) 61 Cal.2d 430, 437 [38 Cal.Rptr. 884, 392 P.2d 964].) If counsel must

represent conflicting interests or is ineffective because of the burdens of representing more than one defendant, the injured defendant has been denied his constitutional right to effective counsel. (United States v. Glasser, supra; People v. Robinson (1954) 42 Cal.2d 741, 745–748 [269 P.2d 6]; People v. Lanigan (1943) 22 Cal.2d 569, 576–577 [140 P.2d 24, 148 A.L.R. 176]; People v. Douglas, supra; People v. Donohoe (1962) 200 Cal.App.2d 17, 24 [19 Cal.Rptr. 454].)."

It is evident that some real conflict of interest resulting from joint representation must be shown to exist before it can be said that a defendant has been denied an effective assistance of counsel. *U.S. v. Lovano,* 420 F.2d 769, (2d Cir 1970) *cert denied* 397 U.S. 1071. In California the various situations in which a conflict of interest may be shown to exist were cogently set forth in *People v. Romero* (1969) 272 Cal.App.2d 39 when the Court stated:

"'". . . 'Conflicts of interest among codefendants may arise when it would profit one defendant to attack the credibility of another [citation]; when counsel would be restricted in final summation because he might injure one defendant by arguments in favor of another [citation]; when one defendant has a record of prior felony convictions and the others do not [citation]; when the defenses of codefendants are factually inconsistent [citation]; or when appointed counsel believes a conflict of interest may exist [citations].'" (248 Cal.App.2d at p. 606. See also, People v. Perry (1966) 242 Cal.App.2d 724, 729–730 [51 Cal.Rptr. 740].)'" (at page 52.)

An examination of petitioner's case in light of the above criteria shows that no conflict of interest actually existed.

First, petitioner's counsel did not, at any time, express a belief that a conflict may have existed. He represented petitioner throughout the proceedings (RT 5) and was, no doubt, aware of all of the facts of the case and any testimony which may have been presented at the preliminary examination. Although counsel did express concern over whether he should continue to represent petitioner, there was no mention of any possible conflict between petitioner and his two codefendants who had already pled guilty.

Second, since the two codefendants had already admitted their guilt by pleading guilty (RT 8), and since petitioner, in effect, admitted his guilt by entering the single plea of not guilty by reason of insanity, the defense of petitioner and his two codefendants was not factually inconsistent. There were no defenses of any type presented which could have been inconsistent.

Third, counsel was not restricted in his final summation to the jury for fear of injury to one defendant by argument in favor of another defendant because there was, in fact, no other defendant. Both codefendants had already pled guilty and been sentenced to prison (CT 809).

Further, since all three defendants, in effect, admitted the crime and since the two codefendants did

not testify at petitioner's sanity trial, there was no need or opportunity to attack their credibility.

Finally, since all three defendants had just escaped from prison, it is obvious that they all had records of prior felony convictions.

Respondent submits that in the instant case no conflict of interest existed and that petitioner's case may readily be distinguished on several grounds from the case of *People v. Perry* (1966) 242 Cal.App.2d 724, which he cites in his petition to this court.

First, in *Perry* counsel made known to the court on two occasions that a conflict existed and because of this counsel did not feel that he could properly represent the appellant.

Second, although the two codefendants in *Perry* had pled guilty, they were called as witnesses and their attorney still had an obligation to protect them at the time they testified because their cases were still pending before the Probation Officer for preliminary sentence report. Here, the two codefendants were not even called to testify, and further they had already been sentenced to state prison (CT 8–9).

Third, in *Perry* appellant was on trial as a result of his plea of not guilty. Here, petitioner had already admitted his guilt by way of his single plea of not guilty by reason of insanity.

Petitioner's second contention concerning a denial of due process of law pertains to the court's action with regard to his appointed counsel. He asserts that his attorney stated that he did not wish to represent

him but was forced to do so when the court refused to appoint a second attorney.

An examination of the transcript concerning this point indicates that on the day set for trial, just before the selection of the jury, petitioner requested a continuance and also raised the question as to whether defense counsel should continue as his attorney (RT 3–6). After the court explained the procedure followed in making appointments and commented on the abilities of petitioner's counsel, petitioner himself stated that there never was a question as to counsel's ability to defend him (RT 6–7). Petitioner then expressed concern over the absence of some of his records and explained what these records contained (RT 7). Petitioner's attorney stated that he didn't feel that he could go forward because he didn't feel that he had petitioner's confidence (RT 7–8). After additional comment, the court stated that it would not grant petitioner's request for a continuance (RT 12) and then commented further with regard to petitioner's right to counsel (RT 12–13). After this petitioner stated that the only thing he objected to was proceeding without the records (RT 14), and his attorney then agreed to proceed (RT 16).

From this record, it is apparent that petitioner's true concern was the absence of various hospital records of his and not the ability of his attorney to defend him. He therefore did not, in fact, request new counsel and was properly ordered to continue with the attorney appointed to represent him.

Moreover, from an examination of the record, it is evident that by requesting new counsel petitioner was actually seeking a delay in the proceedings. A defendant's right to counsel cannot be manipulated so as to obstruct the orderly procedures in courts, or to interfere with the fair administration of justice, and judges must be vigilant that requests for appointment of a new attorney on the eve of a trial should not become a vehicle for achieving delay. *Bowman v. U.S.*, 409 F.2d 225 (5th Cir 1969), *cert denied* 398 U.S. 967. See also *U.S. ex rel Davis v. McMann,* 386 F.2d 611 (2d Cir 1967), *cert denied* 390 U.S. 958.

Finally, although at the time of petitioner's trial the Public Defender's Office did not exist as such in the county where he was tried, representation of indigents was handled by various attorneys who practiced there. Here, the court had appointed one of these attorneys to represent petitioner and had therefore fulfilled its duty to appoint a competent attorney to represent petitioner's interests. Petitioner had no Constitutional right to have his original attorney relieved and another appointed. California's Constitutional guarantee that an accused shall have the right to appear and defend in person and with counsel is substantially similar to that of the Sixth Amendment to the United States Constitution and both are satisfied by the appointment and appearance of the Public Defender on behalf of the accused. There is nothing in the law that entitles an accused to have the court appoint any particular attorney to defend him. The

refusal to name a particular counsel is not a denial of defendant's right to be represented by counsel because the defendant has no absolute right to be represented by a particular attorney. See *U.S. ex rel Carey v. Rundle* 409 F. 2d 1210 (3d Cir 1969) *cert denied* 397 U.S. 946 (1970), *People v. Williams* (1959) 174 Cal.App.2d 364 *cert denicd* 363 U.S. 807.

Since petitioner had a competent private attorney appointed as a Public Defender to represent him, his Constitutional rights were adequately protected. The trial court properly informed him that if he chose to discharge that attorney, he would have to represent himself, because where a defendant knowingly discharges the Public Defender he does not have the right to have the trial court appoint him private counsel. See *People v. Hernandez* (1962) 209 Cal.App.2d 33, *Ingle v. Fitzharris,* 283 Fed.Sup.205 (U.S. D.C.N.D. Cal. 1968) aff'd 411 F.2d 611 (9th Cir 1969).

III. Petitioner Was Adequately Represented at His State Court Trial

On his Petition for Certiorari to this court, petitioner has raised two contentions pertaining to the effectiveness of his representation at his State court trial. The first of these is that he was denied effective assistance of counsel because his trial attorney allowed him to proceed on a single plea of not guilty by reason of insanity rather than also entering a straight plea of not guilty. The second point which he asserts affirmatively established that he was ineffectively rep-

resented is that his trial attorney failed to assign as misconduct the District Attorney's elicitation of his prior record at the time of his sanity trial.

Under California law, in order to justify relief on the ground of inadequate representation, an extreme case must be disclosed. It must appear that counsel's lack of diligence or competence reduced the trial to a farce or a sham. *People v. Ibarra* (1963) 60 Cal.2d 460. A defendant has the burden of establishing the allegation of inadequate representation not as a matter of speculation, but as a demonstrable reality. *People v. Reeves* (1966) 64 Cal.2d 766 *cert denied* 385 U.S. 952.

Under the Federal cases the same is true. The burden on an appellant to establish his claim of ineffective assistance of counsel is heavy. The whole record is looked to in assessing this claim. *Harried v. U.S.*, 389 F.2d 281 (D.C. Cir 1967). Relief on the grounds of inadequacy of counsel may be obtained only when the representation has been so woefully inadequate as to shock the conscience of the court and make the proceedings a farce, a mockery of justice. Errorless counsel is not required. *U.S. v. Currier,* 405 F.2d 1039 (2d Cir 1969) *cert denied* 395 U.S. 914. A court appointed attorney is not to be declared incompetent because his advice in a given case may in retrospect appear to have been erroneous. *Henderson v. Cardwell,* 426 F.2d 150 (6th Cir 1970).

As noted, petitioner's first assertion that he was denied effective representation is that his attorney

allowed him to enter a single plea of not guilty by reason of insanity rather than also entering a straight not guilty plea. This contention is based on petitioner's assertion that the transcript of his sanity trial bristles with facts which would have been either a complete or partial defense on the merits to the crime charged, and that counsel was unaware of a basic issue of law.

This contention is based on pure speculation, and there is no affirmative evidence in the record that there was even faulty judgment on the part of petitioner's attorney in allowing him to enter a single plea. The plea of not guilty by reason of insanity is one of confession and avoidance whereby commission of the overt act is conceded, but criminal guilt is denied on the sole ground that at the time the overt act was committed, the defendant was suffering such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing or that it was wrong. *People v. Wells* (1949) 33 Cal.2d 330, *cert denied* 338 U.S. 836. Here the record shows that petitioner himself in his testimony at his sanity trial stated that he didn't deny anything. He felt that he needed help and that was what he was asking for (RT 89). By entering the plea that he did, petitioner could readily obtain the assistance which he sought.

The most that can be said with regard to petitioner's present attack upon his trial counsel is that it is hindsight criticism of the trial tactics employed.

As previously noted, the rule is well settled in both the California courts and the Federal courts that retrospective criticism of the way a defendant's lawyer handled the case is not sufficient to sustain the claim that defendant lacked proper representation. See *Borchert v. United States,* 405 F.2d 735 (9th Cir 1968) *cert denied* 394 U.S. 972; *People v. Amoitte* (1963) 215 Cal.App.2d 176. Here, as in *People v. Massie* (1967) 66 Cal.2d 899, petitioner's counsel vigorously represented him and thoroughly cross-examined both the People's witnesses and the court-appointed psychiatrist at his sanity trial, so that his representation was adequate and did not reduce his trial to a farce or a sham.

The basis of petitioner's second assertion that he was denied effective assistance of counsel, is that his attorney failed to assign as misconduct the District Attorney's elicitation of his prior record at his sanity trial.

An examination of the record of this trial, however, reveals that his attorney did in fact attempt to protect his interest by objection, but the trial court properly allowed the District Attorney to go into petitioner's criminal history. First, petitioner's attorney had originally opened this line of questions by asking petitioner if he had been in trouble before. Petitioner replied that he had, and left the jury with the impression that it was only on two previous occasions. (RT 77–79). When time came for cross-examination the District Attorney would therefore be entitled to elicit

further testimony on the subject. Second, and more important, this was not a trial to determine petitioner's innocence or guilt but rather it was one to determine his sanity. In such a situation, under California law, many of the technical rules of evidence are inapplicable. There would be no reason to expect that prejudice in a sanity hearing would be incited to the point of unfairness by knowledge of a defendant's criminal record. To the contrary, in such a situation it would seem reasonable to assume that a history of conduct, past as well as present, would be an important consideration in an appraisal of mental status (see *People v. Houser,* (1965) 238 Cal.App.2d 930). Since the record showed that petitioner's trial attorney did in fact object, the record would not support his assertion that he was afforded inadequate representation of the type which would have reduced his trial to a farce or a sham.

IV. The Court Properly Determined the Crime to Be Robbery of the First Degree

The next contention raised by petitioner is that the trial court committed prejudicial error when it determined that the crime involved was robbery of the first degree. His argument in this regard is that since the degree was not contained in the charging document and there was no stipulation that it was first degree robbery, that it was necessary to conduct a hearing in order for the court to determine the degree. This contention is without merit.

Under California law, all robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree, California Penal Code Section 211(a). Here the record reveals that petitioner was charged with robbery in violation of California Penal Code Section 211 (CT 3). The evidence presented at petitioner's sanity trial established that a shotgun was used in the holdup (RT 34). There was, thus, evidence presented from which the trial court could properly determine the crime to be robbery in the first degree. The fact that this evidence was presented at petitioner's sanity trial would not prevent the judge from using it to determine the degree of the crime. See *People v. Walker* (1948) 33 Cal.2d 250, 264–267.

V. The Action of the Trial Court in Imposing a Consecutive Sentence Upon Petitioner Was Not a Violation of Due Process and Has Become Moot

The final point which petitioner has raised pertains to the imposition of sentence by the trial court. He asserts that it was an abuse of discretion for the trial court to impose a consecutive sentence for the sole reason that he had asked for a jury trial.

While this assertion finds some support under California law in the case of *People v. Morales* (1967) 252 Cal.App.2d 537, the entire question as to petitioner's sentence became moot as of December 13, 1970, when petitioner was completely discharged from his California sentence.

Further, when petitioner filed his application to recall the remittitur in the California Court of Appeal, he was seeking to have his appeal reinstated in order to have his 1959 conviction of first degree robbery reversed. In that event, it could not be used as a prior conviction in the State of Nevada, where he is currently confined.

Assuming his conviction is proper in all other respects, as respondent has urged in the previous points, the question of the propriety of the consecutive sentence, as opposed to a concurrent sentence, would not afford petitioner the relief he seeks. Even if a concurrent sentence had been imposed, his conviction would still be a valid prior conviction, which could be used by the State of Nevada, to enhance his punishment. Petitioner's assertion that the fact that the record indicates that he should serve a consecutive sentence, may influence the Nevada authorities, is completely unsupported by the record. There is nothing to indicate that this factor would have any bearing on the sentence imposed upon him in the State of Nevada.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

California Penal Code

SECTION 211: **Robbery defined**

Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

SECTION 211(a): **[Degrees of robbery]**

All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon, and the robbery of any person who is performing his duties as operator of any motor vehicle, streetcar, or trackless trolley used for the transportation of persons for hire, is robbery in the first degree. All other kinds of robbery are of the second degree.

SECTION 1016: **[Pleas to indictment: Types permissible: Presumption of sanity]**

There are six kinds of pleas to an indictment or an information, or to a complaint charging an offense triable in any inferior court:

1. Guilty.

2. Not guilty.

3. Nolo contendere, subject to the consent of the district attorney and with the approval of the court. The legal effect of such plea shall be the same as that of a plea of guilty, but the plea may not be

used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based.

4. A former judgment of conviction or acquittal of the offense charged.

5. Once in jeopardy.

6. Not guilty by reason of insanity.

A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged; provided, that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged.

APPENDIX—OPINION

IN THE COURT OF APPEAI OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* vs. FRANK HAYGOOD, et al., R. O. CRAIG, *Defendants,* *Defendant and Appellant.*	3 Crim. 2971 Filed: Feb. 26, 1971

Defendant and two other men (Haygood and Bentley) were charged by information with robbery in 1958. All were indigent and one attorney, Mr. Pickering, was appointed and represented all three. Haygood and Bentley pleaded guilty. Defendant entered a plea of not guilty by reason of insanity only.

The jury found defendant to have been sane at the time of the offense. The trial court found the crime to be of the first degree. Defendant was sentenced to state prison for the term prescribed by law to be served consecutively with the sentence he was then serving.

Defendant timely appealed to this court and counsel on appeal was appointed. Appointed counsel filed a "no merit" letter and the judgment was affirmed in People v. Haygood, 179 Cal.App.2d 112, on March 12, 1960.

The case is now before this court for the second time, based on defendant's petition of July 2, 1970, for habeas corpus, treated as a motion to recall the remittitur, upon which this court appointed counsel and ordered "briefing and oral argument of such arguments and contentions as petitioner would raise on appeal from the judgment," and decision on the motion to recall the remittitur has been withheld pending such briefing and argument. (See Orders of July 9, 1970; People v. Wells (1968) 261 Cal.App.2d 468; Anders v. California (1967) 386 U.S. 738, 18 L.Ed.2d 493.)

Defendant makes the following contentions on appeal:

(1) Defendant was denied due process of law because of failure to afford him effective legal representation.

(2) Penal Code section 1016, which provides that a defendant who pleads not guilty only by reason of insanity thereby admits the commission of the offense charged, is unconstitutional in that it comprises acceptance of what is in effect, a complete plea of guilty in violation of constitutional standards.

(3) The court's finding that the crime was robbery in the first degree when that degree was not charged in the accusatory pleading, that fact was not an issue at the insanity trial, and there was no stipulation as to the degree of the offense, constitute prejudicial error.

(4) The court's sentencing of defendant to "consecutive sentences" for the sole reason that defendant had asked for a trial constituted a gross abuse of discretion.

Due to defendant's plea the evidence introduced was as to the issue of insanity and not to the issue of guilt as to the robbery itself. The evidence was primarily petitioner's own testimony, his statements made to arresting officers and others, and testimony of psychiatrists who examined him.

At the time of the crime defendant was an inmate in custody of the Department of Corrections at High Rock Conservation Camp in Weott. He and his fellow inmates, Haygood and Bentley, drank some liquor and then left the camp.

They went to the town of Rio Dell and planned to try to get to Mexico. They "hot-wired" a car in Rio Dell which contained a shotgun and headed for Redding in the car. Upon arriving in Redding, they drove around for most of the day and then early in the evening went to the Empire Bar where they had a few drinks. Since they were short of money, they went outside and looked the place over. Around midnight, by mutual agreement among the three, defendant's partners went in with the shotgun and conducted the holdup. Defendant stayed in the car and was driving when they left.

After the holdup they decided to go to Chico, but were stopped by the highway patrol and escaped on foot, then later were captured in Red Bluff. Defendant felt there was something mentally wrong with him as he couldn't understand why he left camp when he only had a short time left to serve.

The testimony of the two doctors appointed by the court established that in their opinion defendant was mentally disturbed and had a sociopathic personality but that he knew the difference between right and

wrong and the nature and quality of his acts. He was, therefore, legally sane in their opinion. Included in the testimony was a statement that defendant made in one doctor's interview to the effect that he had a drink of whiskey and following that he couldn't remember much until he was in the brush alongside the Sacramento River about three days later.

Defendant testified concerning some blackout spells which began about nine years previously while he was in the Texas Penitentiary. He also admitted spending time in the United States Public Health Hospital in Fort Worth for narcotic addiction. He also related that he was involved in group therapy while in prison.

On cross-examination he stated that he didn't deny the robbery, escape or car theft. All he wanted to do was tell them that he was asking for and needed help.

Prior to the presentation of evidence at his sanity trial he asked for a continuance, expressing a question as to whether or not appointed counsel should continue as his attorney. Although defendant indicated he felt counsel had the ability to defend him, he placed his desire for a continuance primarily on the basis he wanted certain records which had not been subpoenaed. Counsel stated to the court that he felt he did not have the confidence of the defendant and that defendant possibly would be better off with another attorney.

In denying a continuance, the court informed defendant and counsel: "If the defendant is willing to have him remain I think I would ask him to do so.

If he doesn't he will be relieved, but I am not going to appoint another one because I think the constitutional rights of the defendant have been preserved by appointing one public defender for him." At this point assigned counsel agreed to proceed without further objection.

There was an institutional psychiatric report on the defendant finding him "legally sane." This proof of prior psychiatric care came in by testimony through State Department of Corrections Lieutenant McInerney of San Quentin Prison.

On cross-examination the district attorney elicited the entire criminal background of the defendant by asking him the question: "Isn't it true that you have been in trouble with the law since you were ten years old?" Answer" "Yes."

The prosecutor detailed before the jury the defendant's juvenile record as a delinquent. He went into defendant's adult arrest record without distinguishing whether or not convictions followed and whether or not felonies or misdemeanors were involved. After almost all of defendant's criminal record was before the jury, his counsel objected upon the ground that the questioning was proper only as to felonies. The objection was overruled on the ground that at an insanity trial the criminal record may be considered by the jury on the sole issue before them.

Defendant was found by the jury to be sane at the time the offense occurred. Judgment of guilty of robbery in the first degree was rendered, sentence to be

served consecutively with the current sentence with recommendation that defendant be detained for psychiatric treatment if needed.

1. Was Defendant Denied Effective Legal Representation?

No. Defendant's first contention is based on the theory that he was denied procedural due process of law because of failure to afford him effective legal representation. He advances various grounds and arguments in support of this contention which are dealt with below.

He first contends that his appointed attorney had a conflict of interest because he also represented Haygood and Bentley. Defendant argues as if all three participants in the crime had actually been tried on the question of guilt or innocence of the commission of the robbery. His citations of authority are to cases in which such has occurred and one defense counsel has been put in a position where his defense of one client would jeopardize the other. (E.g., People v. Perry (1966) 242 Cal.App.2d 724.)

This contention of conflict of interest has no merit in the instant case. The basic test is set forth in People v. Romero (1969) 272 Cal.App.2d 39, 52, as follows:

"'"... 'Conflicts of interest among codefendants may arise when it would profit one defendant to attack the credibility of another [citation]; when counsel would be restricted in final summation because he might injure one defendant by arguments in favor of another [citation]; when one defendant has a record of prior felony convictions and the others do not [citation]; when the defenses of co-

defendants are factually inconsistent [citation]; or when appointed counsel believes a conflict of interest may exist [citation.].'" (248 Cal.App.2d at p. 606. See also, People v. Perry (1966) 242 Cal.App.2d 724, 729–730 [51 Cal.Rptr. 740].)'"

An examination of defendant's case in light of the above criteria shows that no conflict of interest actually existed.

Since the two codefendant [sic] had already entered pleas of guilty, and since petitioner, in effect, admitted his guilt by entering the single plea of not guilty by reason of insanity, the defense of defendant and his two codefendants was not factually inconsistent. There were no defenses presented which could have been inconsistent.

Counsel was not restricted in his final summation to the jury for fear of injury to one defendant by argument in favor of another defendant, because there was, in fact, no other defendant. Both codefendants had already been sentenced to prison. All three defendants, in effect, admitted the crime, and since the two codefendants did not testify at petitioner's sanity trial there was no need or opportunity to attack their credibility.

The constitutional right to counsel at trial does not include an automatic right to separate counsel, so long as representation is effective. (People v. Chacon (1968) 69 Cal.2d 765.) We find no "conflict of interest" error in this case.

Defendant urges a second contention based on due process. This consists of a claim that the trial court forced his attorney upon him even though the attorney did not wish to represent him. In this connection, the transcript shows that on the day set for trial,

just before the selection of the jury, defendant requested a continuance and also raised a question whether counsel should continue. After the court explained the procedure followed in making appointments and commented on the abilities of defendant's counsel, defendant himself stated that there never was a question as to counsel's ability to defend him. Counsel then stated that he didn't feel that he could go forward because he didn't feel that he had defendant's confidence. After additional comment, the court stated that it would not grant defendant's request for a continuance and then commented further with regard to defendant's right to counsel. After this defendant stated that the only thing he objected to was proceeding without certain hospital records, and his attorney then agreed to proceed. No error occurred.

Defendant makes a third argument that he was denied effective trial counsel because his attorney allowed him to proceed on a single plea of not guilty by reason of insanity when there were defenses counsel could have raised if his client had pled not guilty to the crime itself. Defendant claims that the transcript of defendant's trial on the insanity plea "bristles with facts indicating both complete and partial defenses on the merits to the crime of robbery . . . ." The choice of this strong, quoted language is indicative of defendant's correct knowledge of the law that to justify relief on appeal on the ground of inadequate trial representation, an extreme case must be shown. It must appear that counsel's lack of diligence or competence reduced the trial to a farce or a sham. (People v. Ibarra (1963) 60 Cal.2d 460.) A defendant has the burden of establishing the alle-

gation of inadequate representation not as a matter of speculation but as a demonstrable reality. (People v. Reeves (1966) 64 Cal.2d 766.) Such is not the case here. It is only a matter of speculation that counsel was unaware of any basic issue of law involved and lacked knowledge of the law. There was no faulty judgment on the part of defendant's attorney (In re Rose (1965) 62 Cal.2d 384) in allowing him to enter a single plea, as the record shows, defendant himself stated that he didn't deny anything, including taking part in the robbery. Here, as in People v. Massie (1967) 66 Cal.2d 899, defendant's counsel vigorously represented him and thoroughly cross-examined both the people's witnesses and the court-appointed psychiatrists at his sanity trial, so that his representation was adequate and did not reduce his trial to a farce or a sham.

Defendant also contends that he was denied effective assistance of counsel because counsel failed to assign as misconduct the district attorney's elicitation of his prior record at the sanity trial.

Examination of the transcript established that defendant's prior record was originally brought out on direct examination when his attorney asked if he had ever been in trouble before and he replied that he had. This trouble occurred in other states and involved burglary. Additional testimony was then directed to the record and left one with the impression that he had only been involved with the law on two occasions.

When the district attorney began his examination he asked defendant if he had stated all the trouble that he had been in with the law and defendant replied that he had not. He then asked if it was true that he had been in trouble since he was ten years

old and defendant replied affirmatively. The district attorney then questioned him with regard to specific instances and defendant admitted those instances. At this point defendant's attorney objected because some of the priors were felonies and some misdemeanors. The court stated:

"Well, on an insanity trial it may be considered by the jury to whatever extent they think it affects the issue of insanity. In other words, we are not trying the man for those things he has done in the past, but the jury can take the record into consideration in connection with the other testimony on the sole issue which we have before us here."

From the above record it is apparent that defendant's trial attorney did, in fact, object with regard to his prior record but that the trial court properly allowed the testimony into evidence. The rules foreclosing admission of certain evidence of past conduct in a criminal action being tried on a plea of not guilty to the offense charged are not applicable to a plea of not guilty by reason of insanity, because commission of the offense itself is admitted. (People v. Houser (1965) 238 Cal.App.2d 930, 933.) [1]

2. Is Penal Code Section 1016 Unconstitutional?

No. Defendant argues that section 1016 of the Penal Code is unconstitutional in that it provides by operation of law that a defendant who enters the single

[1] It is further noted that the prosecuting attorney in his closing argument informed the jury that it should consider defendant's prior record for limited purposes only, and the trial court also so instructed the jury.

plea of not guilty by reason of insanity thereby automatically admits the actual commission of the offense charged. Defendant contends that this is a complete plea of guilty "in violation of constitutional standards."

This portion of section 1016 has been tested by constitutional standards of due process of law on more than one occasion and it has consistently been held to be constitutional. (See, e.g., People v. Hickman (1928) 204 Cal. 470; People v. Walker (1948) 33 Cal.2d 250.) However, defendant relies on the more recent case of Boykin v. Alabama (1969) 395 U.S. 238, 23 L.Ed. 2d 274, which holds in effect that a guilty plea to the offense itself cannot be accepted without the record disclosing a meaningful waiver of certain constitutional rights, such as the privilege against self-incrimination, and others. Defendant contends that since such a plea is an admission of the offense because of section 1016, that the record must disclose inquiry by the trial judge and intelligent waiver by defendant.

Defendant's contention here can be disposed of on procedural grounds without considering the substantive merit or lack of merit of the contention. In the case of In re Tahl (1969) 1 Cal.3d 122, cert. den., 26 L.Ed.2d 72, the California Supreme Court has held that the Boykin requirements are to be given prospective application only to those cases in which pleas were entered subsequent to the effective date of the Boykin decision. In the instant case the plea under

consideration was entered on January 5, 1959, 10 years before the Boykin decision in 1969.

3. Was It Prejudicial Error to Find First Degree Robbery?

No. Defendant's third contention is that the trial court's finding that the robbery was first degree constituted prejudicial error. He argues that the law requires a hearing and evidence to fix the degree of a crime and there was no such hearing in the instant case.

His argument might have some merit if he had pleaded not guilty to the overt act of robbery itself, but he pled guilty under section 1016 of the Penal Code. This plea of guilty to the overt act brings into play section 1192 of the Penal Code, under which the trial court must fix the degree of robbery. It was specifically so held in People v. Walker, supra, 33 Cal.2d at page 264. Although it has been held that such a determination of degree must be based on evidence (People v. Harris (1959) 175 Cal.App.2d 678, 679), this requirement was met in the instant case. Here the record reveals that defendant was charged with robbery in violation of Penal Code section 211. The evidence presented at defendant's sanity trial indicated that a shotgun was used in the holdup. There was thus evidence presented from which the trial court could properly determine the crime to be robbery in the first degree. (Pen. Code, § 211a.) The fact that this evidence was presented at petitioner's sanity trial would not prevent the judge from using it to determine the degree of the crime. (See

People v. Walker, supra, 33 Cal.2d at pp. 264–265.) We find no prejudicial error here.

4. Was Consecutive Sentencing an Abuse of Discretion?

Defendant's last contention is that the trial court grossly abused its discretion by sentencing defendant to consecutive sentences. He bases his argument here entirely on a statement of the trial judge that he reserved concurrent sentences for those who plead guilty.

Defendant's argument is based on an attempted extension of the reasoning in People v. Henderson (1963) 60 Cal.2d 482, 495–497, to the effect that a defendant should not be forced to forego an appeal in a murder case where he has been given a life sentence by the risk of a death penalty on retrial. Consequently the court in Henderson said he could not be sentenced to death in the second trial. In the instant case, defendant seems to be arguing that the fear of consecutive sentences due to the stated practice of the judge would force a defendant to refrain from exercising his right to trial. We see no sound analogy with the Henderson case.

Even though there might possibly be other authority for an argument that the trial court abused its discretion and penalized defendant for seeking an insanity trial, no such issue was raised by defendant (cf., People v. Morales (1967) 252 Cal.App.2d 537, 542.) There is no necessity for this court to rule on the merits of this contention of this particular defendant relating to consecutive sentences because the petition for habeas corpus filed with this court on July 2, 1970, discloses in Exhibit "D" thereto that defendant's discharge date from his consecutive Cali-

fornia sentences was December 13, 1970. The question has thus become moot. Moreover, the petition filed by defendant makes it evident that he sought reinstatement of his appeal in order to have his 1959 California conviction of first degree robbery reversed. In that event it could not be used as a prior conviction in the State of Nevada where he is currently confined. But since this conviction is proper in all other respects, as we have held hereinabove, the question of the propriety of a consecutive sentence, as opposed to a concurrent sentence, would not afford defendant the relief he seeks. Even if a concurrent sentence had been imposed, his conviction would still be a valid prior conviction which could be used by the State of Nevada to enhance his punishment.

Having considered all the contentions defendant advanced in this case, we conclude that no reversible error is shown. Recall of the remittitur would be an idle act and the petition treated as a recall motion is therefore denied. (People v. Wells, supra, 261 Cal. App.2d at p. 484.)

CERTIFIED FOR NONPUBLICATION.

REGAN

———————————J.

We concur:

FRIEDMAN

———————————Acting P.J.

JANES

———————————J.